United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7037

United States Court of Appeals

For the Second Circuit.

AUDREY WEINER, AS ADMINISTRATRIX OF THE ESTATE OF JULIE A. WEINER, Deceased,

Plaintiff-Appellant-Appellee,

v.

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC. and RONALD BROWN,

Defendants-Appellees-Appellants.

Appeal from the United States District Court for the Eastern District of New York

BRIEF OF DEFENDANTS-APPELLEES-APPELLANTS
Greyhound Bus Lines, Inc. and Ronald Brown

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STATEMENT

This appeal is from a judgment in favor of the defendants in an action to recover for alleged wrongful death, and from an order denying a motion for a new trial.

The case was tried before Dooling, J. and a jury. The action arose out of a collision between a private car driven by decedent's mother, the defendant BARBARA WEINER, and a bus owned by defendant GREYHOUND BUS LINES, INC., and operated by defendant RONALD BROWN. The decedent, JULIE A. WEINER, was a passenger in the private car operated by her mother, the defendant BARBARA WEINER. It was not disputed, at the trial, and it appears beyond dispute on this appeal, that the WEINER car, proceeding easterly, crossed a double yellow line into the westbound lane where it sheared off the front of the defendant GREYHOUND's bus which was proceeding westerly, and was entirely on its side of the double yellow line, in the westbound lane. After shearing off the front of the defendant GREYHOUND's bus, the WEINER car collided with the passing car of the defendants STONE.

At the close of the plaintiff's case, the Trial Court dismissed the complaint as against the defendant GREYHOUND and its driver, holding that there was no evidence of any negligence, on the bus driver's part, that could be submitted to the jury. The Trial Court also dismissed the complaint as against the defendants STONE. Defendants-appellees-appellants GREYHOUND and BROWN have filed a cross-notice of appeal from the judgment insofar as the Trial Court

also dismissed their cross-complaint against the defendants STONE. Defendants-appellees-appellants GREYHOUND and BROWN pray that, should the plaintiff's complaint be reinstated on this appeal, that their cross-complaint be likewise reinstated against the defendants STONE.

This brief is respectfully submitted on behalf of the defendants-appellees-appellants GREYHOUND BUS LINES, INC. and RONALD BROWN, the GREYHOUND bus driver.

THE TESTIMONY

Police Sargeant STANNARD, called by plaintiff, testified that, on March 7, 1971, the date of the accident, he was a patrolman. He investigated the accident (50 - 52) (Numerical references are to pages of the Appellant's Appendix as indicated by the large numerals appearing at the top center of the pages of the Appendix). Approaching the point of the accident from either direction, there is a large hill which would "converge sort of in the bottom, roughly about where the accident occurred". In answer to the question as to whether the road was curved, the witness testified that, "There was a slight buffer before". (53) The WEINER car would be coming around a gradual curve to the left, while the bus would be driving on a gradual curve to the right. The speed limit was 55. (54) On the right-hand side of each driver there was a shoulder and guardrails (56), about four and a half feet from the end of the paved roadway consisting of three cables strung through posts. (57) There was one lane in each direction, about ten feet wide. The lanes were divided by a double yellow line (58) which meant that each driver had to stay to the right. (59) The witness reached the scene 10 or 15 minutes after the accident. (60) As far as he knew, the vehicles involved had not been moved. (61) After taking care of the injured, he attempted to speak to the drivers. (62) He wasn't able to speak to the defendant BARBARA WEINER, the driver of the WEINER car, until three days later. (63) She told the witness "she could not remember" how the accident happened. The witness spoke to the defendant (Barry) STONE, the driver of the STONE car (which was in the second collision

with the WEINER car) (64) He said "he saw Mrs. WEINER go off the right side of the road, come back on the road, go across and hit the bus head-on". He tried to get around them and the WEINER vehicle came back in his lane and the WEINER's right rear fender and the STONE's left rear side fender came in contact. The witness also spoke to the bus driver at the hospital. (65) He said he was coming east, and "saw Mrs. WEINER lose control of the vehicle and come across into his lane". (66) The witness ascertained that the impact between the bus and the WEINER car took place "approximately on the middle of the GREYHOUND BUS's lane; maybe a little more to "the side" closer to the guardrails". (77) The WEINERS, the bus driver and seven or eight bus passengers were taken to the hospital. (78) There was "a little bit of snow" on the roadway surface. (81) The bus driver told the witness that the WEINER car was about 250 feet away from him when he saw it run off the road. (82) From the point where the WEINER car left the road, to the point where the contact took place between the WEINER car and the bus, the distance was 104 feet, measured by the witness. (89) That distance was from the point where the WEINER car "went off the road, hit the guardrail", to the "point of impact" with the bus, diagonally across the road. (90) The witness "was able to determine the point of impact between the WEINER car and the guardrail" and he "located the point of impact" with the bus. "Then he measured the distance, found it to be a hundred and four feet". (91) At the time of the accident, the WEINER car was going downhill, the bus uphill. (96) At the time of the

impact, the bus was half on the road, half on the shoulder. (97-98) "From the top of the hill to the point of the accident" the distance was about 800 feet. This was the hill down which the WEINER car was proceeding. (99-100) The bus was eight or nine feet wide. (135) "At the point of impact at the right, there was snow at the edge of the road and then there was this fence." Beyond the fence, there was "a drop off, a ravine". When the witness got to the scene, "the GREYHOUND BUS was off against the guardrail, next to the guardrail". The door could not be opened. There was damage to the guardrail. "The vehicle was pushed up against the guardrail and the guardrail was bent." (137) No part of the bus was ever in the eastbound lane. (138) The busdriver was injured, and taken, by ambulance, to the hospital where he was operated on. When the witness saw the bus driver, at the hospital, he was in pain. (140) He told the witness that, "as soon as he saw this car coming over on his side, he pulled as far as he could to his side of the road". He told the witness "he was practically stopped when the accident occurred". (142) "...he said he got over as far as he could and tried to get over as far as he could". (143) When the witness reached the scene, the guardrail was bent where the bus was up against it. (146)

Defendant, BARBARA WEINER, called by the plaintiff, testified that she had no recollection of the accident except that she remembered that she was driving, having relieved her husband who had been driving previously. (185-189)

Defendant, LOUIS B. WEINER, called by the plaintiff, testified that he was sleeping just prior to the accident. He awoke to see a guardrail in front, and then the front of a GREYHOUND BUS, and that was all he remembered until he was being taken out of the car. (268-276)

Defendant, RONALD BROWN, called by plaintiff, testified that he was employed by defendant GREYHOUND. (304). At the time of the accident, he was driving a bus about 38 feet long, seven and a half to eight feet wide, weighing "approximately 28,000 empty". (309) He was traveling in a lane ten feet wide. (312) He "was hugging the right side of the road". (321) On the shoulder of the road there was "generally wet slush" and "snow piled up against the guardrails". (322) His speed was "approximately 30, 35 miles an hour". (326) When he first saw the WEINER car, he didn't know how far away it was. At a Motor Vehicle Bureau hearing, he had testified that it was "hard to say" how far away it was, but that he "would say roughly 800 feet". He testified at the trial that "apparently (he) didn't take the question as to what it was said--it was 800 feet from the top of the hill to the point of impact". (328) When he saw the WEINER car pull off the road, that was an indication, to him, of danger. He was then approximately 225 feet away. (329) He had made a report to his employer (330) in which he had said that, when he first noticed the danger, the other vehicle was at the "top of the hill". (331) At that time, he was at the bottom, and that distance, the witness

intersection accident where relative distances might have some

had said, was 800 feet. When he saw the danger, he "immediately applied the brakes, pulled the bus over to the right side of the road, as far as (he) can go". (332) He went on to the shoulder before the impact. (333) The WEINER car "went into the guardrail on the right-hand side, came diagonally across the road in front of the bus, fast". It "went diagonally across its eastbound lane and then crossed the center lines and went into the (bus') lane". (334) When the WEINER car crossed the center line, the bus was approximately 150, 200 feet away. On an examination before trial, he had testified that that distance was approximately 200 feet. (335) From the time he "applied the brakes until the time of the impact, the bus traveled approximately 60 feet. On his examination before trial, he had testified that this distance was approximately 70 or 80 feet. (337) His estimates of distance were his best guesses. "It's almost impossible to judge distances when you have two moving vehicles". (338) The accident happened "all just quick". (339) He had reported that, at the impact, the location of the bus was half on the shoulder, half in the driving lane. (346) The left side of the bus was approximately four feet from the center line of the roadway. At his examination before trial he had testified that that distance was "approximately one foot to the right on (his) side". (349)

Plaintiff's attorney read the examination before trial of the defendant, JANE STONE, who testified that she did not see the accident. (392-393) She did see the point at which the WEINER car went off the road and then cross the center of the road but she did not see the contact with the bus, nor did she see the bus coming towards her. (394) She "could not locate the bus, (she) couldn't tell ...where it was, how fast it was going". (395) Her "impression was the bus was definitely on its own side of the road". She testified that "it did not appear that the bus had swerved". She had "no way of knowing" whether the bus had slowed down before the accident. (397)

At the end of the plaintiff's case, the Trial Court, over the exceptions of the plaintiff and the defendants GREYHOUND and BROWN, granted the motion of the defendants STONE for a directed verdict in their favor.

Defendants GREYHOUND and BROWN moved to dismiss. (424) The Trial Court pointed out that "there is no evidence that the bus was traveling at an excessive rate of speed, that it was pursuing an erratic course, (436), that it was out of line or that it was doing anything which could have produced in MRS. WEINER a reaction of some sort that would make her take a maneuver which led her into trouble in order to avoid an accident....

v. MURPHY, 10 Cir., 103 F. 2d 117." NATIONAL MUTUAL CASUALTY CO. V.

"....the only evidence is simple unmodified regular approach down the highway, the bus traveling at a moderate rate of speed." (437) The Trial Court also pointed out that the only thing the bus driver could do, to attempt to avoid the accident, was to apply his brakes, which he did. (438) The Trial Court held that "there isn't any evidence of GREYHOUND negligence here". (443) The motion of the defendants GREYHOUND and BROWN was granted. (446-451)

THE MOTION FOR A NEW TRIAL

Plaintiff applied to the Trial Court for a new trial (4) contending, insofar as defendants GREYHOUND and BROWN were concerned, that the dismissal of the complaint was erroneous (5). The Trial Court held that there was no evidence of any negligence on the part of these defendants. The bus was on its own side of the road. The "accident happened in a time so very brief....that the GREYHOUND driver was powerless to do anything except, it seems, to bear somewhat to the right as he applied his brakes. There is every indication in the evidence, and nothing to the contrary, to suggest that he did manage both to slow the bus somewhat and to bear somewhat to the right before the impact....". (13-14) The Trial Court concluded that "the evidence discloses nothing that could support a finding of r gligent driving on the bus driver's part, and does not indicate that any escape path

was open to him". (15) The motion to set aside the dismissal of the complaint as against the defendants GREYHOUND and BROWN was denied in all respects. (22)

THE QUESTIONS PRESENTED

A - WAS THERE ANY EVIDENCE PRESENTED FROM WHICH A REASONABLE INFERENCE MIGHT BE DRAWN THAT THE GREYHOUND BUS DRIVER WAS GUILTY OF ANY NEGLIGENCE THAT WAS A PROXIMATE CAUSE OF THE ACCIDENT?

B - SHOULD THIS APPELLATE COURT DISTURB THE DISPOSITION MADE BY THE TRIAL COURT?

C - ASSUMING THAT THERE WERE INCONSISTENCIES IN THE EVIDENCE REGARDING SPEED AND DISTANCES, COULD SUCH INCONSISTENCIES BE A PROPER BASIS FOR AN AFFIRMATIVE FINDING OF NEGLIGENCE?

Questions A and C were answered, in effect, in the negative, by The Trial Court. It is respectfully submitted that Question B is for this Appellate Court to answer.

THE ARGUMENT

POINT I

AT THE TRIAL, THERE WAS NO EVIDENCE PRESENTED FROM WHICH A REASONABLE INFERENCE MIGHT BE DRAWN THAT THE GREYHOUND BUS DRIVER WAS GUILTY OF ANY NEGLIGENCE THAT WAS A PROXIMATE CAUSE OF THE ACCIDENT

It was not disputed, at the trial, that the WEINER car suddenly left the road to its right, struck a guardrail, turned left across the center line into the opposite lane and struck the bus, shearing off the front of the bus.

"It was not (defendant's driver's) duty to anticipate the remote contingency that a car on the other side of the road would hurtle across the divider and suddenly appear directly in his path." GOOCH v. SHAPIRO, 7 A.D. 2d 307, mot. den. 8 N.Y. 2d 753, affd 8 N.Y. 2d 1088.

"Concededly, at the time of the impact, the (WEINER) automobile was beyond (the center) and on the wrong side of the road, and there is no reasonable basis in the evidence to conclude that the (WEINER) automobile was so situated more than one or two seconds prior to the impact.....

"There is no evidence in the record from which a reasonable inference might be drawn that the defendant (driver) was guilty of any negligence which was a proximate cause of the accident. The defendant (driver) could not reasonably be expected to have anticipated the sudden surge of the (WEINER) automobile across the highway and into his path. (Kutlina v. Yiengst, 286 App. Div. 922, 141 N.Y.S. 2d 671, affd. 1 N.Y. 2d 770, 153 N.Y.S. 2d 45; Wolfson v. Darnell, 15 A.D. 2d 516, 222 N.Y.S. 2d 458.)

" 'The consequence is that a driver in his proper lane is not required to anticipate that a car going in the opposite direction will cross over into that lane (Gooch v. Shapiro, 7 A.D. 2d 307, 182 N.YS. 2d 744, affd. 8 N.Y. 2d 1088, 208 N.Y.S. 2d 34, 170 N.E. 2d 830).'"

PALMER v. PALMER, 31 A.D. 2d 876, affd. 27 N.Y. 2d 945.

There was no claim that the bus was proceeding in any fashion other than orderly. Concededly, it was at all times entirely within its own lane, on its own side of the road, and travelling at a moderate rate of speed. There was not a shred of evidence that the bus operator was guilty of any act, or failure to act, which might have caused the WEINER car to cross into the lane of the bus. Under these circumstances, ".....it is clear that the plaintiff did not establish a prima facie case upon the undisputed facts, and the motion to dismiss (was properly) granted, without the submission of the case to the jury." St. Denis v. Skidmore, 14 A.D. 2d 981, affd. 12 N.Y. 2d 901.

The evidence, offered by the plaintiff, was obviously inadequate to warrant a finding of negligence on the part of the defendant bus driver.

"Since plaintiff's evidence, considered by itself along with any reasonable inferences to be drawn therefrom, is insufficient to support a verdict, the complaint must be dismissed and judgment directed for defendant (CPLR Rule 5522; Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E. 2d 809; 4 Weinstein-Korn-Miller, N.Y. Civ. Prac. Pars. 4401.14 - 4401.15, 4404.06)."

MALONE v. NEW YORK TRANSIT AUTHORITY, 20 A.D. 2d 768, affd. 16 N.Y. 2d 978.

The Trial Court properly dismissed the complaint, at bar, because, "under no reasonable aspect of the case is there any issue for submission to the jury", and "under no view of the record is there an issue of fact calling for the verdict of a jury." CALORE v. DOMNITCH, 5 Misc. 2d 895.

It has been held that "A court is justified in directing a verdict in favor of a party when it finds that by no rational process could the trier of the facts base a finding in favor of the other party upon the evidence presented and hence, as a matter of law, the party was not entitled to recover. (Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E. 2d 809). Applying this principle here, the court could have found that by no rational process could the jury base a finding of neligence on the part of the defendant upon the evidence presented." MAJURY v. EDMUND NILES HUYCK PRESERVE, INC., 33 A.D. 2d 621.

In another case in which the plaintiff failed to prove a prima facie case, it was held that ".....considering the evidence in the entire case, ...the plaintiff has totally failed to sustain the burden of proof and .....any verdict by the jury in favor of the plaintiff (would have to) be set aside and the jury directed to find a verdict in favor of the defendant. When a trial court, considering all the evidence of an entire case, concludes that a verdict in favor of plaintiff must be set aside as unsupported by

sufficient evidence, it is its duty to direct a verdict for defendant or a non-suit. McDONALD v. METROPOLITAN ST. RY. CO., 167 N.Y. 66, 60 N.E. 282, GETTY v. WILLIAM ROGER SILVER CO., 221 N.Y. 34, at page 39, 116 N.E. 381, at page 382." PERITO v. NORTHERN INS. CO. of NEW YORK, 189 Misc. 204.

The non-suit was proper since plaintiff "submitted no proof from which the jury by any rational process could have based a finding in favor of(plaintiff. The non-suit was properly) granted because the court would have been required to set aside a contrary verdict for legal insufficiency of evidence. (Fuhrman v. Davis, 7 A.D. 2d 616, 178 N.Y.S. 2d 677)." In Re Motor Vehicle Accident Indemnification Corp., 20 A.D. 2d 699.

It has also been held that " 'The test to be applied in such a case, of course, is ....."whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party." UNITED STATES FIDELITY & GUARANTY CO. v. BLAKE (C.C.A.9) 285 F. 449, 452, and cases there cited....' SORVIK v. UNITED STATES, 9 Cir., 52 F. 2d 406, 410." PAUL v. ELLIOT, 107 F. 2d 872, 874.

"The rule is that the trial court should direct a verdict for the defendant when the evidence and all of the inferences that can reasonably be drawn therefrom do not constitute a sufficient basis for a verdict for the plaintiff. GUNNING v. COLLEY, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720." BROWN v. CAPITAL TRANSIT CO., 127 F. 2d 329, 330, cert. den. 317 U.S. 632.

The rule has also been stated as follows:

"When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. RANDALL v. B. & O. R. CO., 109 U.S. 478, 3 S. Ct. 322, 27 L. Ed. 1003; PATTON v. TEXAS & PACIFIC R. CO., 179 U.S. 656, 21 S. Ct. 275, 45 L. Ed. 361. Otherwise stated, if the evidence is of such conclusive character that a verdict returned for one party, whether plaintiff or defendant, would have to be set aside in the exercise of a sound judicial discretion, the trial court should withdraw the case from the jury and direct a verdict for the other party. SMALL CO. v. LAMBORN & CO., 267 U.S. 248, 45 S. Ct. 300, 69 L. Ed. 597; see also: OKLAHOMA NATURAL GAS CO. v. McKEE, 10 Cir., 121 F. 2d 583; WHEELER v. FIDELITY & DEPOSIT CO., 8 Cir., 63 F. 2d 562; FIRST NATIONAL BANK & TRUST CO. of MUSKOGEE v. HEILMAN, 10 Cir., 62 F. 2d 157; UNITED v. STEWART, 61 App. D. C. 115, 58 F. 2d 520. This is so even when the evidence on the trial was conflicting, if it was so conclusive that a contrary verdict would have been set aside. NATIONAL MUTUAL CASUALTY CO. v. EISENHOWER, 10 Cir., 116 F. 2d 891; MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N v. SNYDER, 6 Cir., 109 F. 2d 469; FARR CO. v. UNION PAC. R. CO., 10 Cir., 106 F. 2d 437; NEW AMSTERDAM CASUALTY CO. v. FARMERS' CO-OP UNION, 8 Cir., 2 F. 2d 214: PECK v. STAFFORD FLOUR MILLS CO., 8 Cir., 289 F. 43; EWERT v. BECK, 8 Cir., 235 F. 513." GRINNELL CO. v. MILLER, 150 F. 2d 345, 355.

"According to plaintiff the most favorable inferences deducible

from the evidence submitted at the trial, ...as a matter of law it would be insufficient to support a verdict in his favor. In the circumstances, the trial court (properly) directed a verdict for defendant. 'The court is justified in directing a verdict in such case "not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and hence, as a matter of law, the party was not entitled to recover." McDONALD v. METROPOLITAN ST. RY. CO., 167 N.Y. 66, 70, 60 N.E. 282, 283.' BLUM v. FRESH GROWN PRESERVE CORP., 292 N.Y. 241, 245, 54 N.E. 2d 809, 811." STRASBERG v. EQUITABLE LIFE ASSUR. SOC. of U.S., 281 App. Div. 9.

In none of the cases cited was the failure of the plaintiff to prove a prima facie case as glaring as at bar. The Trial Court had no alternative but to order the non-suit.

POINT II

THIS APPELLATE COURT SHOULD NOT DISTURB THE DISPOSITION MADE BY THE TRIAL COURT

Plaintiff contends that the Trial Court erred in ordering the non-suit because there were some conflicts in the evidence. These alleged conflicts will be discussed more fully in Point III of this brief, infra. Suffice it to say, at this point, that these alleged conflicts were not of sufficient weight to warrant submission to the jury. It has been held that "where the evidence is conflicting and the trial court has directed a verdict, the appellate court may not lawfully reverse the judgment founded upon it unless upon a consideration of the evidence, it is convinced it was not of such a conclusive character that the court below, in the exercise of a sound discretion should not have sustained a verdict in the opposite direction. FOYE LUMBER CO. v. PENNSYLVANIA R. CO., 8 Cir., 10 F 2d 437.....

".....the evidence was of such a conclusive character that, had the case been submitted to the jury and a verdict returned for the plaintiff, the trial court, in the exercise of a sound judicial discretion, would have been obliged to set it aside; .....accordingly, there was no error in directing the jury to return a verdict in favor of appellees." GRINNELL CO. v. MILLER, 150 F. 2d 345, supra, 355-356.

It has likewise been held that "where the trial judge has the opportunity to see and hear the witnesses and consider matters not capable of record, his decision on a motion for a directed verdict is entitled to weight in an appellate court. PATTON v. TEXAS & P. R. CO., 179 U.S. 658, 21 S. Ct. 275, 45 L. Ed. 361." BROWN v. CAPITAL

TRANSIT CO., 127 F. 2d 329, 330, cert. den. 317 U.S. 632, supra.

The disposition by the Trial Court, at bar, should be affirmed by this Appellate Court.

POINT III

ANY INCONSISTENCIES, IN THE EVIDENCE, REGARDING SPEED AND DISTANCES, COULD NOT BE A PROPER BASIS FOR AN AFFIRMATIVE FINDING OF NEGLIGENCE

Plaintiff argues that the Trial Court should not have ordered a non-suit because the bus driver could not be more specific, as to his rate of speed, than to testify that he was proceeding, before the accident, at a rate of 30, 35 or 40 miles per hour; that he was not quite sure of his position when he first realized the danger of a collision; that there was a variance between his testimony at the trial, and at an examination before trial, regarding the location of the bus when the WEINER car crossed into his lane, and regarding the location of the bus at the moment of the impact.

The inability of the defendant driver, to testify accurately as to speed, position and distances, was no basis for an affirmative finding of negligence on his part. "There was therefore, no evidence to support the imputation of(the defendant driver's) negligence....., and the issue (was properly) not .....submitted to the jury." MOSSON v. LIBERTY FAST FREIGHT, 124 F.2d 448, 450, C.A.N.Y.

Even if there had been testimonial inconsistencies of such a degree as to warrant disbelief, and certainly there was no such degree at bar, it is established that "The disbelief of a witness does not necessarily establish a prima facie case. HEISE v. EARNSHAW PUBLICATIONS, INC., D.C.D. Mass., 130 F. Supp. 38 Cf. DYER v. MacDOUGALL, 2 Cir., 201 F. 2d 265, where though the logical possibility of proving an affirmative case by disbelief of witnesses was declared to exist in 'strict theory', the court granted summary judgment against the

party having the burden of proof.

".....(disbelief of a witness) does not satisfy the substantial evidence requirement of New York..... Here the(plaintiff) has no substantial evidence whatever on its side." MANDELBAUM v. UNITED STATES, 251 F. 2d 748, 752, C.A.N.Y.

The testimonial inconsistencies, at bar, were of a very inconsequential nature.

"It is well known that a lay witness' estimates of time, speed and distance, particularly those made in a flash at the moment of occurrence of a dramatic event, are almost certain to be inaccurate and for that reason are not to be relied on implicity. With this in mind the court was entitled to accept the testimony of the witness as painting a general picture of the event." RUSSELL v. GONYER, 264 F. 2d 761.

"In general it may safely be said that persons in ordinary travel are often called upon to estimate the speed of vehicles approaching or apparently approaching upon the highway, or to estimate distances intervening between the vehicle being driven and that being approached. Mistakes with reference thereto frequently occur..... Such mistakes of judgment fall far short of establishing want of ordinary care. BOAZ v. WHITE'S AUTO STORES, 1943, 141 Tex. 366, 172 S.W. 2d 481." NORTH TEXAS PRODUCERS ASSOCIATION v. STRINGER, 346 S.W. 2d 500, 506.

Basically, distances, speeds and positions are of no significance whatsoever in the accident that occurred at bar.

Distances between vehicles, or between a vehicle and the point of impact with another vehicle, may be of some significance in an

intersection accident where relative distances might have some bearing on the right of way. LEE v. CITY BREWING CORP., 279 N.Y. 380. There was no issue, whatsoever, at bar, regarding right of way.

Plaintiff argues that it is the jury's prerogative to decide whether the bus driver's testimony was credible.

"Overriding the jury's prerogative to resolve issues of credibility is the judge's power to direct a verdict or to set a verdict aside when the law so requires. CPLR 4401, 4404..... Since (the trial court) would have been obliged to set aside a verdict against the (defendant, the trial court) followed BLUM v. FRESH GROWN PRESERVE CORP., 292 N.Y. 241, 54 N.E. 2d 809 (1944), and took the case from the jury by granting defendant's motion to dismiss.

".....However sacrosanct the right to trial by jury, it does not follow that a judge must, like a conveyor belt, mindlessly pass on to the jury every factual issue asserted by the litigants." DuBOSE v. VELEZ, 63 Misc. 2d 956.

In an action for wrongfuly shooting and killing of plaintiff's decedent, the defendant appealed from a judgment, in favor of the plaintiff, based upon a jury verdict. The Circuit Court of Appeals pointed out that, at the trial, "There was no dispute as to any essential fact." The Court of Appeals held that the only conclusion, that could be drawn from the evidence, was that the defendant had acted in self-defense, and that the case should not have been submitted to the jury. On appeal, plaintiff argued that the case had been

properly submitted to the jury because there had been a conflict in the evidence as to how far apart the decedent and defendant were when the shooting took place, and as to where the bullet emerged from decedent's head. It was held that these conflicts did not create a significant question of fact authorizing submission of the case to the jury. BURDON v. WOOD, 142 F. 2d 303, cert. den. 323 U.S. 733.

The inconsistencies in the BURDON case are quite similar to the inconsistencies which are the basis of plaintiff's arguments on this appeal.

The Trial Court properly dismissed the complaint against defendants GREYHOUND and BROWN because the evidence, while it might have been, in some respect, conflicting was "of such conclusive nature that if a verdict were returned for (the plaintiff against these defendants) the exercise of sound judicial discretion would require that it be set aside." CENTRAL SURETY & INS. CORPORATION v. MURPHY, 103 F. 2d 117, 119. To similar effect, see MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N. v. SNYDER, 109 F. 2d 469, 472, citing GUNNING v. COOLEY, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; NORTH PENNSYLVANIA R. CO. v. COMMERCIAL NAT. BANK, 123 U.S. 727, 733, 8 S. Ct. 266, 31 L. Ed. 287.

In addition, the complaint was properly dismissed because the evidence, although it might have been conflicting in some respect, was "of such a conclusive nature as to permit no serious dispute. See, A.B. SMALL COMPANY v. LAMBORN & CO., 267 U.S. 248, 45 S. Ct. 300, 69 L. Ed. 597; GUNNING v. COOLEY, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720; ROUSE v. BURNHAM, 10 Cir., 51 F. 2d 709; MURRAY CO. v. HARRILL, 10 Cir., 51 F. 2d 883; CENTRAL SURETY & INSURANCE CORPORATION

v. MURPHY, 10 Cir., 103 F. 2d 117." NATIONAL MUTUAL CASUALTY CO. v. EISENHOWER, 116 F. 2d 891, 894.

Plaintiff contends that there was an issue as to whether the bus driver moved the bus to the right when he realized the danger of a possible collision. The police sergeant testified that the bus was over to its right, as far as it could go, against the guard-rail. The bus driver testified that he moved the bus to the right as far as he possibly could. Plaintiff argues that there was an issue, nevertheless, because defendant JANE STONE testified to the contrary. Plaintiff is misrepresenting the purport of JANE STONE's testimony. She testified that she did not see the accident; she did not see the contact between the WEINER car and the bus (393); she couldn't tell where the bus was, or how fast it was going (395). Her impression was that "the bus was definitely on its own side of the road", and "it did not appear that the bus had swerved" (397). This is a far cry from plaintiff's claim that that she testified that the bus did not swerve to the right." (See Appellant's Brief, page 13) There is absolutely no mention of any direction of a swerve in her testimony. As a matter of fact, she could just as well have intended to convey the impression that the bus did not swerve to the left, especially since the testimony of no swerve followed very closely after her testimony that "the bus was definitely on its own side of the road." (397) It is thus clear that plaintiff has misquoted the testimony,no doubt accidentally. In any event, there is no basis, nor warrant, in any of the evidence submitted, nor in the sum total of the evidence, for any conclusion contrary to the disposition made by the Trial Court.

CONCLUSION

THE JUDGMENT AND ORDER, UNDER REVIEW, SHOULD BE AFFIRMED.

Respectfully submitted,

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Attorneys for Defendants-Appellees-Appellants
GREYHOUND BUS LINES, INC. and
RONALD BROWN

SAMUEL LEVITT
Of Counsel

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of Sept, 1975 deponent served the within Brief upon Reilly + Reilly
Spatt + Baumen
Colin Zachary

attorneys(s) for appellee

in this action, at 233 Broadway 225 W 34th NYC 75 Little Clove Rd S.I. NY
NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
24 day of Sept, 1975.
William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976